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No. 07-447

FILED

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SUPREME COURT, U.S.

In The (2)

# Supreme Court of The United States

RIDGEVIEW PARTNERS, LLC.,

*Petitioner,*

v.

MAUREEN ENTWISTLE, individually and as Chairperson of the Town of Greenville Planning Board, PAUL EWANCIW, SCOTT REED, JOHN KARECKI, ALLEN BOBB, LEO MCCAREY, CYNTHIA EWANCIW MORSE, individually and as Members of the Town of Greenville Planning Board, MICHAEL SUSSMAN, individually and as Special Counsel, THE TOWN OF GREENVILLE PLANNING BOARD and THE TOWN OF GREENVILLE,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF IN OPPOSITION


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## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents, the Town of Greenville, its Planning Board and the members thereof, state that they have no parent companies or no wholly owned subsidiaries.

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## OBJECTIONS TO QUESTIONS PRESENTED

Question 1:

Petitioner misstates the holding of the Second Circuit Court of Appeals in raising its first question. The Second Circuit held that the Petitioner's claim that the Respondents' actions violated Petitioner's right to petition government for redress of grievances was legally insufficient because the site plan application does not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions." Dougherty v. Town of North Hempstead BZA, 282 F.3d 83, 91 (2d Cir. 2002). (Appendix 14-a).

Thus, the court held that the petition set forth, an application for site plan approval, was not the type of petition that invokes First Amendment protection, and the Petitioner cannot refer this Court to any cases which have so held.

Question 2:

Petitioner's second question incorrectly presumes that fees charged to an applicant for an agency's technical consultant review of the proposed site plan are "illegal." Indeed, it is well settled that such expenses, including legal fees, are permissible, if reasonable, where the applicant seeks a benefit such as site plan approval or a building permit. Jewish Reconstructionist Synagogue of North Shore Inc. v. Incorporated Village of Roslyn Harbor, 40 NY2d 158, 162 (1976); Coates v. Planning Board of Village of Bayville, 58 NY2d 800 (1983)(finding that the Planning Board could impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application

because petitioner's could not show that the fees were unnecessary or that the Board acted arbitrarily).

Even if the Court were to consider Petitioner's limited question, whether "a government approval agency must at least accept an application" for a site plan approval, the District Court found, and Petitioner's have failed to refute, that the Respondents accepted and conducted a review of Petitioner's first and second applications.

## STATEMENT OF THE CASE

On January 24, 2001, Petitioner filed its first application to construct 1,524 townhouse units in the Town of Greenville.

Petitioner's agreed to pay reasonable fees associated with the review of their application.

The Planning Board discussed the application on March 12, 2001, and set April 25, 2001 as the date for a Public Hearing. The Planning Board also held a workshop meeting on March 26, 2001 at which their counsel and engineer, after review, briefed them on the project.

The Public Hearing was not held because the Town had neither accepted a complete draft environmental impact study nor issued a negative declaration as required under the New York State Environmental Quality Review Act.

Petitioner filed a New York State court proceeding under New York Civil Practice Law and Rules Article 78 alleging that the Planning Board acted in an arbitrary and capricious manner in the review of its application.[1] No order

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[1] See also Siegel, David D., New York Practice, § 557, et seq. (West 4th Edition 2005)("The Article 78 proceeding supersedes the common law writs of mandamus, prohibition and certiorari to review, supplying in replacement of all three of them a uniform device for challenging the activities of an administrative agency in court.").

discontinuing or withdrawing the Article 78 Petition was ever submitted.

On July 2, 2001, Petitioner announced that it was withdrawing its first application, and simultaneously delivered a second application for 2,081 condominium units on the same property to the Town Engineer.

The Town Engineer received, and began to review the application without any instruction from the Planning Board as was his past practice.

On legal advice, the Planning Board subsequently decided not to proceed with review of the second application until Petitioner had paid the outstanding expenses due on the review of the first application, totaling $2,900.2

On July 23, 2001, Petitioner was advised, that upon payment of these incurred expenses, the Planning Board would proceed with its review of the second, revised application at its August 20, 2001 meeting.

## OBJECTIONS TO GRANTING THE WRIT

The District Court properly granted Respondents' motion for summary judgment, and the Second Circuit correctly affirmed the District Court.

As set forth above, Petitioner misinterprets the Second Circuit's holding and seeks to assert a right where none exists. That court held that the Petitioner's claim that the Respondents' actions violated Petitioner's right to petition government for redress of grievances was legally insufficient because the site plan application did not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions." (Appendix 14-a).

Thus, the court held that the petition set forth, an application for site plan approval, was not the type of petition

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2 The expenses incurred included legal counsel - $1,500; engineer - $1,000; and planner - $400, totaling $2,900. (Appendix 5-a).

that invokes First Amendment protection, and the Petitioner cannot refer this Court to any cases which have so held.

Even if the Court were to consider Petitioner's limited question, whether "a government approval agency must at least accept an application" for a site plan approval, the District Court found, and Petitioner's have failed to refute, that the Respondents accepted and conducted a review of Petitioner's first and second applications.

Petitioner's argument incorrectly presumes that fees charged to an applicant for an agency's technical consultant review of the proposed site plan are "illegal." Indeed, it is well settled that such expenses, including legal fees, are permissible, if reasonable, where the applicant seeks a benefit such as site plan approval or a building permit. Coates, supra (finding that the Planning Board could impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application because petitioner's could not show that the fees were unnecessary or that the Board acted arbitrarily).

Petitioner's reliance on Roslyn Harbor, supra is misplaced because there is an important distinction between a Planning Board, the administrative agency involved in this matter, and a Zoning Board of Appeals, the agency at issue in Roslyn Harbor. There, the New York Court of Appeals held that a Zoning Board of Appeals, a quasi-judicial agency, may not pass along the legal costs of its review because the applicant was seeking relief from an overly restrictive ordinance. Supra .

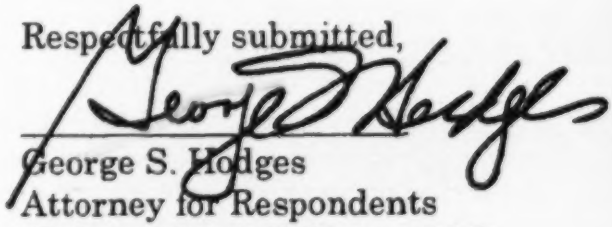
On the contrary, the court held that reasonable legal fees are permissible where the applicant is seeking a benefit, such as the discretionary approval of an application by a Planning Board. Id.

## CONCLUSION

Based on the foregoing, it is respectfully submitted that the Court must deny the writ for certiorari. Petitioner has misread the Second Circuit's opinion, and misstates the law, in arguing that their application for a Planning Board approval invoked the protection of the First Amendment. Furthermore, it is well settled that a Planning Board may impose legal, engineering and clerical fees upon the petitioners as a condition for final approval of their application unless the petitioner's show, in a New York State action, that the Board acted arbitrarily.

Dated: October 12, 2007

Respectfully submitted,



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Statement Pursuant to Rule 33 (1)(g)

I, George S. Hodges, attorney for the Respondents herein, hereby certify pursuant to Rule 33 (1)(g) of the Rules of the Supreme Court that the foregoing brief in opposition contains 1,198 words.

Dated: October 19, 2007

S/ Geo S Hodges

George S. Hodges